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PP

v.

RESTY AGPALO & ORS

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COURT OF APPEAL, PUTRAJAYA

SURIYADI HALIM OMAR JCA

HASAN LAH JCA

AHMAD MAAROP JCA

[CRIMINAL APPEAL NO: W-05-82-05]

C

2 DECEMBER 2010

CRIMINAL LAW: Penal Code - Section 302 - Murder - Appeal against acquittal - Prima facie case - Whether established - Failure to call important witnesses - Adverse inference - Whether applied - Direct evidence - Whether there was direct evidence to implicate respondents with murder - Circumstantial evidence - Whether of such weak quality that no judge would convict

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CRIMINAL LAW: Penal Code - Sections 302 and 34 - Murder-Common intention - Whether proved - Prima facie case - Whether established - Failure to call important witnesses - Adverse inference - Whether applied - Direct evidence - Whether there was direct evidence to implicate respondents with murder - Circumstantial evidence - Whether of such weak quality that no judge would convict

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F The first respondent, second respondent and third respondent were jointly charged with the murder of one Xu Jian Huang ('the deceased'). At the end of the prosecution's case, the three respondents were acquitted. The prosecution being dissatisfied appealed. This court only heard the appeal against the first respondent (R1) and the third respondent (R3) as the appeal against the second respondent (R2) had been struck out. It was the prosecution's case that R1, R2 and R3 in furtherance of a common intention had committed murder from 26 September 2004 at 11pm to 27 September 2004 at 3.30am on the deceased.

G According to the prosecution, R1, on instruction of R2, had physically abused the deceased person for an alleged theft from R2 and these physical abuses were recorded in R1's mobile phone. From 25 September 2004 until 27 September 2004, the deceased person was supposed to have been tightly tied up, and later

H thrown into the swimming pool and drowned. Subsequently, the

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deceased was brought to the hospital by R1 and two others. PW28, the doctor on duty, established that death was caused by homicidal drowning. However, due to the insufficiency of evidence adduced in court such as the failure of the prosecution to call an important witness to court, and without any direct evidence adduced to establish the common intention between R1 and R3 and the identity of the murderer, the prosecution failed to establish a *prima facie* case.

**Held (dismissing the appeal; affirming the High Court order)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:**

- (1) P50 (1-8) exhibits comprised pictures of the deceased being tied up but still alive at the time when the images were taken. PW6, a PDRM forensic expert, testified that the pictures only exposed the manner how the deceased was tied but did not indicate who the murderer of the deceased was. No evidence was adduced by any of the prosecution's witness to establish when the deceased's pictures were taken and who took them. Those pictures could have been taken on the day when PW5 (the gardener) saw the deceased being tied up *ie*, a couple of days before the death. PW5, being the only witness who could tell the story as to what happened at R2's house on 25 September 2004, at best was a person who witnessed the scenario on that date, but not the day when the 'homicidal drowning' happened *ie*, on 27 September 2004. His evidence merely established that the deceased was tied up but still alive when seen by him, and that R1, R2 and another Chinese lady were there. Nothing was said of R3. (paras 9 & 10)
- (2) The prosecution had attempted to tender the statements (ID127 and ID128) of one Razbean, an important witness, recorded under s. 112 of the Criminal Procedure Code, as he was nowhere to be found. The attempt to have it tendered was rejected by the learned judge on several grounds *ie*, that the prosecution failed to fulfil the prerequisites stipulated in s. 32(1)(i) of the Evidence Act 1950, failure to take reasonable steps to ensure Razbean's attendance to give his evidence in court, and the signature of Razbean in ID127 were not the same with his signatures in ID128 A-D which was the supplement. Without ID127 and ID128 the prosecution's position was untenable as without them there would be no evidence to support the prosecution's case

- A against R3. The learned judge committed no error when
finding that the signatures of Razbean were different in
ID127 and ID128 A-D. As there were discrepancies on the
signatures there was every possibility that these documents
were not his. Further, having thoroughly scrutinised the notes
B of proceedings, the rejection by the learned judge of ID127
and ID128 as exhibits was correct as there was non-
compliance of the legal prerequisites. (paras 11 & 12)
- (3) Since direct evidence was difficult to come by to prove
intention much therefore depended on inferences picked up
C from the acts, conduct or other relevant circumstances of the
case. With R2 being out of the appeal, the possibility of the
prosecution establishing the ingredient of ‘furtherance of
common intention’ was an uphill task. Unless any instruction
D was forthcoming from R2, if ever there was one, there was
absolutely no reason why R1 and R3 would want to kill the
deceased. The fact that they had rushed the body to the
hospital would neutralise any suggestion that they personally
wanted him dead. Evidentially there was no direct evidence to
E show the involvement of R3 in the commission of the said
offence as he was never mentioned by PW5 of being in the
house. Without R3 being identified and PW5 never made
mention of him the prosecution had absolutely failed to
connect him with the murder rap. Without any evidence
F against R3, it was hard for the prosecution to prove common
intention under s. 34 of the Penal Code between him and R1.
(para 15)
- (4) Apart from the failure to call Razbean as a witness, there was
obvious failure to call two other material witnesses *ie*, Derwati
G and Fang Shu Jing, former employees who had lived in that
very house where the incident was alleged to have taken
place. The failure of the prosecution to call important
witnesses who might have possibly witnessed the murder and
unfold the narrative of the prosecution’s case, was fatal to the
H prosecution’s case. With the failure to call especially these two
witnesses, the gap as to what happened on that relevant date
was like a gaping wound that became putrid for want of
suture and medical attention. R1 and R3’s burden was only
I to prove reasonable doubt and not to prove the truth of any
of their allegations. An adverse inference therefore must be

taken against the prosecution in the circumstances of the case. Hence, there was no direct evidence to implicate R1 and R3 with the murder, what was left was rather weak circumstantial evidence. (para 17)

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- (5) The onus on the prosecution, when the evidence is of a circumstantial nature, is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient (*Chang Kim Siong v. Public Prosecutor*). This court was not satisfied that the evidence, taken together, irresistibly led to the conclusion that R1 and R3 committed the offence. The prosecution had not proven a *prima facie* case. The circumstantial evidence in this case presented by the prosecution was of such weak quality that no judge would have called the defence let alone convict even if the defence was called. (paras 20 & 21)

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Bahasa Malaysia Translation of Headnotes

Responden pertama, responden kedua dan responden ketiga dituduh bersama dengan pembunuhan satu Xu Jian Huang ('simati'). Di akhir kes pendakwaan, ketiga-tiga responden dibebaskan. Pihak pendakwaraya tidak puas hati dan membuat rayuan. Mahkamah ini hanya mendengar rayuan terhadap responden pertama (R1) dan responden ketiga (R3) kerana rayuan terhadap responden kedua (R2) telah dibuang. Ia adalah kes pihak pendakwaan bahawa R1, R2 dan R3 dalam melanjutkan niat bersama telah melakukan pembunuhan dari tarikh 26 September 2004 pada pukul 11 malam ke tarikh 27 September 2004 pada 3.30 pagi ke atas simati. Menurut pihak pendakwaan, R1, atas arahan R2, telah secara fizikal mendera simati atas dakwaan mencuri dari R2 dan deraan fizikal ini telah direkodkan di dalam telefon bimbit R1. Dari 25 September 2004 sehingga 27 September 2004, simati diandaikan telah terikat dengan ketat, dan dibuang ke dalam kolam renang di mana simati telah lemas. Seterusnya, simati telah dibawa ke hospital oleh R1 dan dua orang lain. Walaubagaimanapun, berdasarkan keterangan yang kekurangan bukti yang diberi di mahkamah seperti kegagalan pihak pendakwaan untuk memanggil saksi yang penting ke mahkamah, dan tanpa keterangan terus untuk membuktikan niat bersama di antara R1 dan R3 dan identiti pembunuh, pihak pendakwaan gagal membuktikan kes *prima facie*.

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A Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

- B (1)** Eksibit P50 (1-8) mengandungi gambar-gambar simati diikat tetapi masih hidup pada masa gambar-gambar itu diambil. PW6, seorang pakar forensik PDRM, menyatakan bahawa gambar-gambar tersebut hanya mendedahkan cara simati diikat tetapi tidak menunjukkan siapa pembunuh simati sebenarnya.
- C** Tiada keterangan diberi oleh saksi pendakwaan untuk membuktikan bila gambar-gambar simati diambil dan siapa yang mengambilnya. Gambar-gambar itu mungkin diambil pada hari apabila PW5 (tukang kebun) nampak simati diikat iaitu dua hari sebelum kematiannya. PW5, satu-satunya saksi yang boleh menceritakan apa yang berlaku di rumah R2 pada
- D** 25 September 2004, paling kuat pun adalah orang yang menyaksi apa yang berlaku pada tarikh tersebut, tetapi bukan pada tarikh berlakunya 'homicidal drowning' *ie*, pada
- E** 27 September 2004. Keterangananya hanya membuktikan bahawa simati diikat tetapi masih hidup apabila dilihat olehnya, dan R1, R2 dan seorang lagi perempuan Cina berada di situ. R3 langsung tidak disebut.
- (2)** Pihak pendakwaan telah mencuba memasukkan kenyataan-kenyataan (ID127 dan ID128) satu Razbean, seorang saksi yang penting, yang direkodkan di bawah s.112 Kanun Tatacara Jenayah, kerana Razbean tidak dapat dijumpai. Percubaan untuk memasukkan kenyataan-kenyataan tersebut ditolak oleh yang arif hakim atas beberapa alasan iaitu pihak pendakwaan gagal memenuhi syarat-syarat yang telah ditetapkan di dalam
- F** s. 32(1)(i) Akta Keterangan 1950, kegagalan untuk mengambil langkah-langkah munasabah untuk memastikan kedatangan Razbean ke mahkamah untuk memberi keterangan, dan tandatangan Razbean dalam ID127 tidak sama dengan tandatangan di dalam ID128 A-D iaitu tambahannya. Tanpa
- G** ID127 dan ID128 kedudukan pendakwaan tidak dapat dipertahankan kerana tanpanya tidak terdapat keterangan untuk menyokong kes pihak pendakwaan terhadap R3. Yang arif hakim tidak salah apabila memutuskan tandatangan-tandatangan Razbean adalah berbeza dalam ID127 dan ID128
- H** A-D. Oleh kerana terdapat percanggahan-percanggahan pada
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tandatangan-tandatangan terdapat beberapa kemungkinan bahawa dokumen-dokumen tersebut bukan datang darinya. Seterusnya, setelah meneliti nota-nota prosiding, penolakan ID127 dan ID128 oleh yang arif hakim sebagai eksibit-eksibit adalah betul kerana terdapat ketakpatuhan syarat-syarat sah.

- (3) Oleh kerana keterangan terus sukar timbul untuk membuktikan niat oleh itu banyak bergantung pada inferens diambil oleh akta-akta, tingkah laku atau keadaan-keadaan yang relevan dalam kes. Dengan R2 tidak ada kena mengena dengan rayuan, kemungkinan pihak pendakwaan membuktikan ramuan 'melanjutkan niat bersama' adalah satu tugas sukar. Melainkan apa-apa arahan datang dari R2, jikalau ada pun, tidak terdapat apa-apa sebab mengapa R1 dan R3 ingin membunuh simati. Fakta bahawa mereka telah membawa mayatnya ke hospital akan meneutralkan apa-apa cadangan yang mereka hendak membunuh simati. Tidak terdapat keterangan terus yang menunjukkan penglibatan R3 dalam perbuatan kesalahan kerana PW5 tidak menyebut R3 berada di dalam rumah tempat kejadian itu. Tanpa R3 dikenalpasti dan PW5 tidak menyebut mengenainya pihak pendakwaan telah gagal memperhubungkannya dengan tuduhan membunuh. Tanpa keterangan terhadap R3, ia adalah sukar untuk pihak pendakwaan membuktikan niat bersama di bawah s. 34 Kanun Keseksaan di antara R3 dengan R1.

- (4) Selain dari kegagalan memanggil Razbean sebagai saksi, juga terdapat kegagalan jelas untuk memanggil dua lagi saksi penting iaitu Derwati dan Fang Shu Jing, pekerja-pekerja lama yang telah tinggal di rumah tersebut di mana kejadian itu didakwa berlaku. Kegagalan pihak pendakwaan untuk memanggil saksi penting yang mungkin telah menyaksikan pembunuhan dan mungkin boleh membukakan cerita kes pendakwaan, adalah fatal kepada kes pendakwaan. Dengan kegagalan memanggil terutama sekali kedua-dua saksi tersebut, jurang yang wujud mengenai apa sebenarnya yang berlaku pada tarikh relevan itu seperti luka yang terbuka yang menjadi busuk dan memerlukan jahitan dan rawatan perubatan. Beban R1 dan R3 hanyalah untuk membuktikan keraguan munasabah dan bukan untuk membuktikan kebenaran dakwaan-dakwaan mereka. Oleh itu inferensi yang bertentangan perlu diambil terhadap pihak pendakwaan dalam keadaan kes ini. Maka, tidak terdapat

- A keterangan terus untuk melibatkan R1 dan R3 dengan pembunuhan tersebut, dan apa yang tertinggal hanyalah keterangan ikut keadaan yang lemah.
- (5) Tanggungjawab pada pihak pendakwaan, di mana keterangan bersifat ikut keadaan, adalah berat dan keterangan mestilah menunjukkan kesimpulan bahawa tertuduh bersalah. Jika terdapat jurang dalam keterangan ia tidak memadai (*Chang Kim Siong v. Public Prosecutor*). Mahkamah ini tidak berpuas hati bahawa keterangan, diambil bersama-sama, akan membawa kepada kesimpulan bahawa R1 dan R3 telah melakukan kesalahan. Pihak pendakwaan tidak membuktikan kes *prima facie*. Keterangan ikut keadaan di dalam kes ini yang disampaikan oleh pihak pendakwaan adalah berkualiti lemah sehingga tiada hakim akan memanggil pembelaan dan apatah lagi menyabitkan jika pembelaan dipanggil.
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Case(s) referred to:

- Abdul Ghani Jusoh & Anor v. PP* [1980] 1 LNS 179 FC (*refd*)
Alliedbank (Malaysia) Bhd v. Yau Jioek Hua [1998] 2 CLJ 33 HC (*refd*)
Chan Chwen Kong v. PP [1962] 1 LNS 22 HC (*refd*)
- E *Chang Kim Siong v. PP* [1967] 1 LNS 18 FC (*refd*)
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (*refd*)
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC (*refd*)
- F *Kartar Singh & Anor v. Rex* [1952] 1 LNS 43 HC (*refd*)
Mat v. PP [1963] 1 LNS 82 HC (*refd*)
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC (*refd*)
PP v. Mohamed Said [1982] 1 LNS 115 HC (*refd*)
PP v. Norfaizal [2003] 8 CLJ 581 HC (*refd*)
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC (*refd*)
- G *R v. Abott* [1955] 1 All ER 899 (*refd*)
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC (*refd*)
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC (*refd*)
Yaacob v. PP [1965] 1 LNS 203 FC (*refd*)

Legislation referred to:

- H Criminal Procedure Code, ss. 112, 118(1), 179(1)
 Evidence Act 1950, s. 32(1)(i)
 Penal Code, s. 34

For the appellant - Ishak Mohd Yusoff; AG's Chambers

- I *For the 1st & 3rd respondents - Gobind Singh Deo; M/s Gobind Singh Deo*

Reported by Suhainah Wahiduddin

JUDGMENT

A

Suriyadi Halim Omar JCA:

[1] Three persons *viz.* Resty Agpalo (first respondent), Koh Kim Teck (second respondent), and Mohamad Najib bin Zulkifli (third respondent) were jointly charged with the murder of one Xu Jian Huang. At the end of the prosecution's case the three respondents were acquitted. The prosecution being dissatisfied then filed the notices of appeal. Before us we only heard the appeal against respondent 1 (R1) and respondent 3 (R3) as we had earlier struck out the appeal against the second respondent (R2).

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[2] The appeal against R2 was struck out as the prosecution failed to serve the relevant notices on him after many attempts. We were told that he was somewhere in China. After the striking out action we thenceforth moved on to hear the appeal against R1 and R3. With the appeal against R2 out of the way we found no basis or necessity to discuss in detail his involvement with R1 and R3. At the end of the appeal, we found no error in the High Court's order of discharge and acquittal of R1 and R3 at the end of the prosecution's case, and accordingly dismissed its appeal.

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[3] The charge against R1 reads as follows:

Bahawa kamu bersama dengan Mohamad Najib Bin Zulkifli (K/P: 800209-05-5439) di antara 26.9.2004, jam 11.00 malam sehingga 27.9.2004 jam 3.30 pagi, di rumah No. 8 Jalan Mengkuang Off Jalan Ampang, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, dan untuk mencapai niat bersama kamu, telah melakukan pembunuhan dengan menyebabkan kematian ke atas XU JIAN HUANG (Passport No.G 02882177) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan dibaca bersama s. 34 Kanun yang sama.

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[4] The charge against R3 reads as follows:

Bahawa kamu bersama-sama dengan 1. Resty Agpalo, (KP: 721130-12-5013), (2) Koh Kim Teck (KP: 540311-01-5355) di antara 26.9.2004, jam 11.00 malam sehingga 27.9.2004 jam 3.30 pagi, di rumah No. 8 Jalan Mengkuang Off Jalan Ampang, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur dan untuk mencapai niat bersama kamu, telah melakukan

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A pembunuhan dengan menyebabkan kematian ke atas XU JIAN HUANG (Passport No. G 02882177) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan dibacakan bersama s. 34 Kanun yang sama.

B [5] The prosecution's case could only be satisfactorily gauged from the opening speech of the prosecution ie, as to how it intended to establish a *prima facie* case, due to the insufficiency of evidence adduced in court. The prosecution began by stating that R1, R2 and R3 in furtherance of a common intention had committed murder from 26.9.2004 at 11pm to 27 September 2004 at 3.30am on the said Xu Jian Huang (the deceased). The prosecution planned to show that R1, on instruction of R2, had physically abused the deceased person for an alleged theft of RM30,000 from R2. These physical abuses were supposed to have been recorded in R1's mobile phone. Further the prosecution intended to adduce evidence to establish that the deceased person admitted finding only RM10,000 and had handed over that sum of money to R2. R1 thereafter had filed a police report as regards the theft. The prosecution too planned to adduce evidence to show that R1 had extracted a written confession from the deceased person. From 25 September 2004 until 27 September 2004 the deceased person was supposed to have been tightly tied up, and later thrown into the swimming pool and drowned. The prosecution would show that the deceased was brought to the hospital by R1 and two others. To do all the above the prosecution would call the necessary witnesses and buttressed further by exhibits.

G [6] The opening address of the prosecution is relevant, as it will act as a guide for the prosecution, and it enables the court to react accordingly. In fact this speech is important as s. 179(1) of the Criminal Procedure Code demands that the officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused (*PP v. Norfaizal* [2003] 8 CLJ 581; *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197). Even though a verdict may be founded on a basis not indicated in the opening speech, in order to avoid any accusation of any tactical disadvantage to the accused that may occasion a failure of justice, DPPs should ensure that much consideration be given to any opening speech.

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[7] Regretfully for the prosecution here, in the course of the hearing things did not go the way as promised or delineated in the opening speech, as an important witness one Mohd Razbean Mohd Tab failed to turn up. Exhibits that could help the prosecution were disallowed from being tendered. Without the help of Razbean, and without any direct evidence adduced to establish the common intention between R1 and R3 and the identity of the murderer, the prosecution's case weakened tremendously. What was left, in order to establish a *prima facie* case against them, in particular as to what happened on the material date and time, fell totally on circumstantial evidence. Much then depended on the testimony of Subramaniam a/l P Sinnasamy (PW5) and eight pictures tendered as exh. P50 (1-8). These pictures are discussed below.

[8] We now discuss PW5's evidence upon which the prosecution's case tethered on. This person, a gardener who worked for R2, testified that R1 telephoned him to come to R2's house at the given address. He went to R2's house between 8pm to 8.30pm on 25 September 2004 on the invitation of R1. In that house he saw R2, a Chinese lady, and the deceased being tied up. There he was informed by R1 that R2's house had been broken into and the burglar detained. PW5 even managed to communicate with the deceased but left thereafter. PW5, being the only witness who could tell the story as to what happened at R2's house on 25 September 2004, at best was a person who witnessed the scenario on that date, but not the day when the 'homicidal drowning' happened ie, on 27 September 2004. His evidence merely established that the deceased was tied up but still alive when seen by him, and that R1, R2 and another Chinese lady were there. Nothing was said of R3.

[9] P50 (1-8) are exhibits and they comprised pictures of the deceased being tied up but still alive at the time when the images were taken. PW6, a PDRM forensic expert, conducted the extraction of all the images from P27 (a) ie, a telephone, and printed them out. He testified that he conducted the examination of P27 (a) and extracted P50 on 26 September 2004 from it. We found that the pictures only exposed the manner how the deceased was tied but did not indicate who the murderer of the deceased was. Unfortunately no evidence was adduced by any of

- A the prosecution's witnesses to establish when the deceased's pictures were taken and who took them. Those pictures could have been taken on the day when PW5 saw the deceased being tied up ie, a couple of days before the death.
- B [10] The above are the only facts adduced as regards the charges against them. Even though death was caused by homicidal drowning, as described by the doctor (PW28), there was no direct evidence to suggest that R1 and R3 committed the offence or had the common intention between them. Unless there was direct or
- C circumstantial evidence adduced of their involvement with the death, the fact that it was homicidal-related was irrelevant.
- [11] To overcome its shortcoming the prosecution attempted to tender the statements (ID127 and ID128) of Razbean recorded under s. 112 of the Criminal Procedure Code, as he was nowhere
- D to be found. The attempt to have it tendered was rejected by the learned judge on several grounds. He found amongst others, that the prosecution failed to fulfil the prerequisites stipulated in s. 32(1)(i) of the Evidence Act 1950, failed to take reasonable steps to ensure Razbean's attendance to give his evidence in
- E court, failed to track down the material witness or at least put him under bond as per s. 118(1) of the Criminal Procedure Code, and the signatures of Razbean in ID127 were not the same with his signatures in ID128 A-D. ID 128 A-D is the supplement of
- F ID 127. It was obvious to us that without ID127 and ID 128 the prosecution's position was untenable as without them there would be no evidence to support the prosecution's case against R3.
- [12] The court can admit ID 127 and ID 128 but the
- G prerequisites demanded by the Criminal Procedure Code are stringent and cumbersome, and they must be overcome first. Any failure to satisfy those prerequisites will lead to the non-admission of the statements under s. 32 of the Evidence Act 1950 (*Sim Tiew Bee v. Public Prosecutor* [1973] 1 LNS 138, *Public Prosecutor v. Mohamed Said* [1982] 1 LNS 115, *Public Prosecutor v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747). We concluded that the learned judge committed no error when finding that the signatures of Razbean were different in ID127 and ID128 A-D. We too were
- H satisfied that as there were discrepancies on the signatures there was every possibility that these documents were not his (*Alliedbank (Malaysia) Bhd v. Yau Jioek Hua* [1998] 2 CLJ 33; *Abdul Ghani*
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Jusoh & Anor v. Public Prosecutor [1980] 1 LNS 179). The Federal Court in *Yaacob v. PP* [1965] 1 LNS 203 formulated the rule that the question of admissibility of evidence is for the judge, and having thoroughly scrutinised the notes of proceedings, we were satisfied that the rejection by the learned judge of ID127 and ID 128 as exhibits was correct as there was non-compliance of the legal prerequisites.

[13] The next question we asked ourselves was, even if ID127 and ID 128 A-D were tendered in court, would they be enough to call the defence, let alone at the defence stage find R1 and R3 guilty of the offence? With Razbean untested by cross-examination it would be difficult to determine whether he was a credible witness. The prosecution ventilated that the police had made several efforts to trace him but unsuccessful. On the other hand we have evidence adduced that he left his house in January 2005. The last call received by his wife (PW30) was on 12 July 2005, and she testified that her husband would not return until this case was over. In a gist the wife was in contact with him, perhaps knew his whereabouts, and even knew of his stance. His conduct in hiding from the trial already had turned him into a highly questionable character.

[14] We now touch on the last remaining issues. Even though R1 was identified as one of the three persons who sent the deceased to the Gleneagles Intan Medical Center, Ampang we easily concluded that that still did not make him a murderer. If every good Samaritan ends up being a potential suspect this country will end up being an indifferent society.

[15] The law governing criminal liability under s. 34 of the Penal Code was clearly explained by Hashim Yeop Sani J in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, that to succeed the prosecution must establish that the criminal act was done in concert pursuant to a pre-arranged plan or arrangement. Since direct evidence is difficult to come by to prove intention much therefore depends on inferences picked up from the acts, conduct or other relevant circumstances of the case. With R2 being out of the appeal the possibility of the prosecution establishing the ingredient of 'furtherance of common intention' was an uphill task. Unless any instruction was forthcoming from R2, if ever there was one, there was absolutely

- A no reason why R1 and R3 would want to kill the deceased. The fact that they rushed the body to the hospital would neutralise any suggestion that they personally wanted him dead. Evidentially there was no direct evidence to show the involvement of R3 in the commission of the said offence as he was never mentioned by
- B PW5 of being in the house. The first time R3 was supposed to have entered the matrix of the case was when he came out of the vehicle helping to send the deceased to the hospital. But this came out of the opening speech and not from the evidence. Apart from that shortcoming unless there was evidence to show he
- C joined the car from the point where the deceased was picked up, he could have joined R1 along the way. So far no conclusive evidence was tendered to establish how he came into the vehicle. Dr. B. Rajasingam a/l S. Balasingam (PW11) who attended to the deceased only recognised R1 but never R3. Without R3 being
- D identified and PW5 never made mention of him the prosecution had absolutely failed to connect him with the murder rap. Common sense will say that without any evidence against R3, it is hard for the prosecution to prove common intention under s. 34 of the Penal Code between him and R1 (*R v. Abbott* [1955] 1 All ER 899).
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- [16] A rather interesting facet of this case is that, apart from the failure to call Razbean as a witness, there was obvious failure to call two other material witnesses. The two are Derwati and Fang
- F Shu Jing, former employees who have lived in that very house where the incident was alleged to have taken place. PW5 testified in no uncertain term that he saw Fang Shu Jing in that house on the day of his visit. Fang Shu Jing was charged for an offence and sentenced to ten months jail by the Kuala Lumpur Magistrates
- G Court. She was deported back to China after serving the sentence. Unfortunately, for purposes of this case, the prosecution never made any official request to Kajang Prison to extend her detention before sending her back to China. Derwati was detained in the civil prison from 11 October 2004 (the murder being on
- H 26/27 September 2004) but was never called to give evidence in court. There was no difficulty on the part of the prosecution to produce them for purposes of the hearing eg, by extending their stay in Malaysia by some legal processes.

I

[17] In a word, the failure of the prosecution to call important witness who might have possibly witnessed the murder and unfold the narrative of the prosecution's case, was fatal to the prosecution's case (*Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1). With the failure to call especially these two witnesses, the gap as to what happened on that relevant date was like a gaping wound that became putrid for want of suture and medical attention. There was nothing to prevent R1 and R3 of possibly suggesting that the Chinese lady had a role in committing the homicidal drowning. We had to bear in mind that R1 and R3's burden was only to prove a reasonable doubt and not to prove the truth of any of their allegations (*Mat v. Public Prosecutor* [1963] 1 LNS 82). An adverse inference therefore must be taken against the prosecution in the circumstances of the case.

[18] From the above, as there was no direct evidence to implicate R1 and R3 with the murder, what was left was rather weak circumstantial evidence (*Kartar Singh & Anor v. Rex* [1952] 1 LNS 43). At best at the prosecution's stage, to reiterate, the evidence adduced was as follows. PW5, two days before the murder came to the house and saw R1, R2, a Chinese lady, and the deceased tied up but still alive. He made no mention of R3. The deceased being tied up was supported by P50 (1-8). Unfortunately as regards this piece of evidence, the prosecution had failed to establish when the deceased's images were taken. Again those images did not establish the murderer or connect R1 and R3 with the murder (except that the mobile telephone was R1's).

[19] The next set of evidence was pertaining to the scene where R1 and (an unidentified) R3 brought the deceased's body to the hospital. Transporting the deceased body to the hospital does not mean that they killed him. That was about all that was produced by the prosecution.

[20] The onus on the prosecution, when the evidence is of a circumstantial nature, is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient (*Chang Kim Siong v. Public Prosecutor* [1967] 1 LNS 18). There was no evidence to show:

- A i. R3 was in that house;
 ii. R1 and R3 had abused the deceased;
 iii. R1 and R3 tied up the deceased;
- B iv. R1 and R3 threw the deceased into the water;
 v. the furtherance of common intention had been established; and
 vi. R3 was in the vehicle used to send the deceased to the hospital.
- C

[21] We were not satisfied that when the above evidence, taken together, irresistibly led to the conclusion that R1 and R3 committed the offence; or putting it in another way we were not satisfied that the prosecution had proven a *prima facie* case. The circumstantial evidence in this case presented by the prosecution was of such weak quality that no judge would have called the defence let alone convict him even if the defence was called (*Chan Chwen Kong v. PP* [1962] 1 LNS 22; *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130).

- E [22] Based on the above reasoning we dismissed the appeal and affirmed the High Court order.

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